Filed 2/26/19 P. v. Davila CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RIGOBERTO VILLAGRANA DAVILA, Defendant and Appellant.	G055636 (Super. Ct. No. 14WF2044) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheri T. Pham, Judge. Affirmed.

Mark D. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Eric A. Swenson, Allison Acosta, and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Rigoberto Villagrana Davila appeals from a judgment after the jury convicted him of numerous sexual offenses. Davila asserts the prosecution's theory of duress was not supported by substantial evidence. We disagree and affirm the judgment.

FACTS

When C.V. was 11 years old, Davila, her father, began to molest her. Davila would touch C.V.'s breasts, vagina, and buttocks while helping her take a shower. When Davila touched her breasts while washing them, it made C.V. uncomfortable. He would also rub C.V.'s vagina on the outside with his fingers. He did this about 10 times.

Davila stopped touching C.V. for a while, but he started again after the family moved to Westminster. Davila and his wife, C.V.'s mother (Mother), had been sharing a bed, but about six months after moving, they began sleeping in separate beds. C.V. was 12 or 13 years old, and Davila began molesting her again.

Davila again started helping C.V. with her shower. He would put his fingers inside C.V.'s vagina every time he helped her take a shower. He also touched her vagina when she was not bathing. C.V. described Davila putting her on her parents' bed and touching her vagina. When he took his penis out she was confused and scared because she knew it "wasn't right." He began rubbing his penis on her vagina and then he inserted his penis into her vagina. C.V. described experiencing pain when Davila penetrated her vagina and telling him it hurt. He responded, "It's going to feel good."

When the family was living in the Westminster house, C.V. and her sisters went to their grandmother's house after school. Davila would pick them up from the grandmother's house and take them home. The sisters would be placed in a locked room, while C.V. and Davila would remain outside the room. One of the younger sisters recalled while locked in the back room hearing the bed shaking and C.V. screaming and crying. She also heard C.V. and Davila arguing.

Davila also forced C.V. to orally copulate him. The first time Davila wanted her to orally copulate him, C.V. said no. Davila grabbed his penis and put it near her mouth. She told Davila she did not like it, but it happened anyway.

Once C.V. started menstruating, she was afraid of getting pregnant. Davila would purchase pregnancy tests for her to take. Even though the results were negative, Davila would take C.V. into the backyard and he would step on her stomach while wearing boots, "Just to be safe."

When she was 13 years old, Davila talked to C.V. about telling people what he was doing. He said, "If you tell, I can get in big trouble. Your sisters won't have a father. If I go to jail, I don't know what I would do with myself." Davila explained he would hurt himself. Davila's comments "affect[ed her] in a way to not want to tell people." C.V. believed that if she told anyone Davila was sexually abusing her, what Davila told her would come true. C.V. felt she had a responsibility to prevent that and to continue to have sex with Davila.

Davila last had sex with C.V. in June 2013. On that day, Davila put his penis inside C.V.'s vagina and put his mouth on her vagina. The next day, Davila wanted to have sex with C.V. while her mother was in the shower. C.V. and Davila were arguing. C.V. told Davila, "I'm tired of this." Davila responded, "Then say something. Tell your mom right now." When Mother got out of the shower, C.V. "was crying and crying." Mother said, "Let's go to the store." Mother took C.V. and her sisters to the store. C.V. continued to cry so Mother asked her what was wrong. C.V. was afraid to tell Mother because of the things Davila had told her would happen if she told. C.V. told Mother that it was going to ruin their lives and destroy the family. Mother stopped the car, mother and daughter got out of the car, and C.V. told Mother that Davila had sex with her. C.V. and Mother went to the police station where police interviewed her. C.V. had a sexual assault examination and a social worker interviewed her.

C.V. had not showered between the June 2013 abuse by Davila and the collection of DNA samples during the medical examination. In addition to samples taken during C.V.'s medical examination, her clothing, and the clothing Davila was wearing on June 11, were tested for DNA. Davila could not be excluded as the contributor of DNA found on C.V.'s breasts. Only one in one trillion people would be expected to match that DNA. Davila's DNA was consistent with a sample taken from C.V.'s vagina, with a frequency of one in 8,000 unrelated individuals. Davila's DNA was also consistent with a sample taken from C.V.'s vulva, as well as from the underwear she was wearing June 11. C.V. could not be excluded as the contributor of DNA found on Davila's boxer shorts. Mother's DNA did not match the major female profile on the boxer shorts.

After the filing of the charging documents and litigation of a few pretrial motions, an amended information charged Davila with the following offenses: aggravated sexual assault of a child, rape (Pen. Code, §§ 269, subd. (a)(1), 261, subd. (a)(2), all further statutory references are to the Penal Code) (count 1); aggravated sexual assault of a child, oral copulation (§§ 269, subd. (a)(4), 288a, subd. (a)(2)(B)), (count 2); aggravated sexual assault of a child, sexual penetration (§§ 269, subd. (a)(5), 289, subd. (a)) (count 3); lewd act upon a child under 14, touching breasts (§ 288, subd. (a)) (count 4); lewd act upon a child under 14, touching buttocks (§ 288, subd. (a)) (count 5); lewd act upon a child under 14, touching vagina (§ 288, subd. (a)) (count 6); lewd act upon a child under 14, oral copulation (§ 288, subd. (a)) (count 7); forcible rape (§ 261, subd. (a)(2)) (count 8); lewd act upon a child, touching breasts (§ 288, subd. (c)(1)) (count 9); lewd act upon a child, touching vagina (§ 288, subd. (c)(1)) (count 10); lewd act upon a child, oral copulation (§ 288, subd. (c)(1)) (count 11); and lewd act upon a child, touching buttocks (§ 288, subd. (c)(1)) (count 12).

At trial, C.V. testified to the events described above. C.V. stated she shouldered a heavy burden because, "As a 13- or 12-year-old, I felt like I was responsible

to pleasure my father for us to be a happy family, because if it wasn't the way he wanted, he would be in one of his moods or argument [*sic*] with my mom."

Davila offered the testimony of a retired obstetrician and gynecologist. Based upon his review of the police reports, social worker's report, medical reports, forensic nurse's report, and photographs of C.V.'s vagina, he disagreed Davila had sex with her one or two times a day from age 13 to age 14 and one-half.

A jury found Davila guilty of all offenses. The trial court sentenced Davila to prison for a total of 69 years and eight months. The court imposed a determinative sentence of 24 years and eight months as follows: the upper term of eight years on count 4, one-third the middle term (two years) on counts 5, 6, and 7, to run consecutively to the term imposed in count 4, the upper term of eight years on count 8, to run consecutively to the term imposed in count 4, and one-third the middle term (eight months) on counts 9, 10, 11, and 12, to run consecutively to the term imposed in count 4. The court imposed an indeterminate sentence of consecutive 15-year-to-life terms on counts 1, 2, and 3.

DISCUSSION

Davila contends his convictions on count 1 (aggravated sexual assault of a child, rape), count 2 (aggravated sexual assault of a child, oral copulation), count 3 (aggravated sexual assault of a child, sexual penetration) and count 8 (forcible rape) are not supported by substantial evidence because there was no evidence of duress. He essentially argues C.V. was a willing participant and consensually engaged in these sexual acts. Nonsense.

"The principles governing our assessment of defendant's various challenges to the sufficiency of the evidence are well settled. We '"'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a

reasonable doubt.'"' [Citation.] The same standard applies when examining the sufficiency of the evidence supporting a special circumstance finding. [Citation.] 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.' [Citation.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 57.)

Davila focuses much of his brief on what the prosecutor argued or failed to argue. But consistent with our standard of review, we review the whole record in the light most favorable to the judgment to determine whether substantial *evidence* of duress exists, not counsel's argument, which is not evidence.

Davila asserts his convictions for aggravated sexual assault based on rape, oral copulation, and sexual penetration and forcible rape can only stand if each is supported by evidence he accomplished the sexual act against C.V.'s will by a direct or implicit threat. Davila relies on the definition of duress provided in *People v. Pitmon* (1985) 170 Cal.App.3d 38 (*Pitmon*),[1] and *People v. Leal* (2004) 33 Cal.4th 999 (*Leal*). Quoting the *Pitmon* court, Davila indicates duress requires "'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.'" (*Pitmon, supra,* 170 Cal.App.3d at p. 50.) He correctly notes the definition used for rape does not include a threat of hardship. (*Leal, supra,* 33 Cal.4th at pp. 1004-1010.)

The Attorney General, citing *Leal, supra,* 33 Cal.4th 999, does not quarrel with Davila's definition of duress. But he adds, "'[D]uress involves psychological coercion.'" (*People v. Senior* (1992) 3 Cal.App.4th 765, 775 (*Senior*)[2].) The Attorney

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[1] *Pitmon* was disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248, footnote 12 (*Soto*).

[2] Numerous appellate courts have rejected *Senior* insofar as they address the requisite level of force. (*People v. Babcock* (1993) 14 Cal.App.4th 383, 388.)

General also cites *People v. Veale* (2008) 160 Cal.App.4th 40, for the principle an actual threat is not necessary to establish duress.

Senior, *supra*, 3 Cal.App.4th 765, is instructive. In that case, victim was 13 and 14 years old when the abuse occurred. Defendant was the victim's father and an authority figure to her, and he put pressure on the victim to submit to the sexual acts by warning after the first molestation that if she talked about the molestation it could result in divorce. (*Id.* at p. 775.) The court stated the following: "Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citations.] 'Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress. [Citation.]" (*Ibid.*) The *Senior* court reversed, finding defendant subjected the victim to psychological coercion in part based on the fact defendant was the victim's father and he warned her not to report the abuse. (*Ibid.*)

Contrary to Davila's claim otherwise, the facts in *Senior* are similar to the facts here. Davila was the same type of authority figure to C.V. as the defendant was to the victim in *Senior*. And C.V.'s testimony demonstrates she felt pressured to engage in sex acts because she thought it was her duty to "pleasure" her father to avoid negative consequences for the family. Finally, C.V. and the victim were roughly the same age, C.V. being slightly younger when the abuse started.

Davila concedes the age and the relationship between Davila and C.V. are factors that can be considered in deciding whether particular conduct by a defendant constitutes a direct or implied threat. But he argues these factors alone cannot establish duress and C.V. was not young enough to be susceptible to psychological coercion. In addition to age and relationship evidence, there was considerably more evidence of duress admitted at trial.

At 11 years old, C.V. said things started to get "unnormal." She explained Davila started to do things to her that a father should not do to a daughter. He began helping her with her showers and touching her "in areas that shouldn't be touched." C.V. testified when Davila touched her breasts while washing them, it made her uncomfortable. She also testified when Davila took his penis out she was confused and scared because she knew it "wasn't right." When she complained about pain when Davila inserted his penis into her vagina, he ignored her pain and proceeded. When Davila grabbed his penis and put it near C.V.'s mouth, she told him she did not like it. But Davila again ignored her protestations and proceeded with an act of oral copulation. C.V.'s sister described hearing C.V. screaming and crying while she was with Davila outside their locked room. When Davila first forced C.V. to orally copulate him, C.V. said no. This behavior does not in any way suggest C.V. was a willing participant. Rather it indicates C.V. was bullied and intimidated into participating. A reasonable inference could be made that C.V. was responding to an implied threat sufficient to support a finding of duress.

Citing C.V.'s testimony, Davila contends "she *never* asked appellant to stop." (Italics added.) This misstates the record. In her testimony, C.V. described how Davila would put his mouth on her vagina or spit inside her vagina both before and after he put his penis inside her. She also testified to various other sexual acts Davila subjected her to. After testifying to these various acts, the prosecutor asked C.V. if she ever told Davila that she did not like what he was doing to her. C.V. said at one point, she did. She testified she told him, "It hurt and I didn't like it." The prosecutor then asked if she told him to stop and she said, "No." C.V. did not testify she "never" asked him to stop. But there did not need to be evidence that C.V. told Davila to stop to establish the acts were accomplished with duress and against C.V.'s will. It is

inconceivable a father would believe his daughter was willingly engaging in sexual acts when she told him it hurts, and she did not like it.

Davila argues, "the record establishes that [he] did not need to use duress" because C.V. "typically initiated the sexual conduct." He relies on C.V.'s testimony that prior to their sexual engagement, she would approach Davila and sometimes he would approach her. She testified she would approach Davila because she thought he liked it when she approached him. C.V. later explained she felt she had a responsibility to "pleasure" her father. She testified, "[I]f it wasn't the way he wanted, he would be in one of his moods or argument [*sic*] with my mom." C.V.'s explanation as to why she would approach her father establishes she was acting under duress and not because she was willingly initiating sexual activity.

Davila's assertion there was no evidence C.V. was reluctant or that Davila physically made C.V. engage in sexual acts is offensive. The suggestion this victim was a willing participant is completely contradicted by the record. From the age of 11, C.V. was subjected to things that she knew were "unnormal." Davila touched C.V. "in areas that shouldn't be touched," and this touching made her uncomfortable. She knew having intercourse with her father "wasn't right" and complained about the pain it caused her. Despite telling Davila she did not like having his penis near her mouth, he placed his penis in her mouth. That C.V.'s sister heard the bed shaking and C.V. screaming and crying is evidence indicative of reluctance on C.V.'s part. None of this evidence suggests C.V. was a willing participant. Any suggestion that Davila did not use force to accomplish sexual acts with C.V. is belied by the record.

Additionally, any contention that Davila had a basis for believing C.V. wanted to continue in a sexual relationship with him is absurd. Evidence of C.V.'s protestations, her screams, and complaint of pain, would clearly indicate to anyone, especially a father, that C.V. did not want to continue in a sexual relationship.

As to C.V. consenting to a continuing sexual relationship, *Soto, supra*, 51 Cal.4th 229, is instructive. In *Soto*, defendant was charged with three counts of lewd acts on a child under 14 by use of force, violence, duress, menace, or fear. (§ 288, subd. (b)(1).) Our Supreme Court held the victim's consent is not a defense to the crime of lewd acts on a child under age 14 under any circumstances. (*Soto, supra*, 51 Cal.4th at p. 248.)

Viewing the evidence in its totality, including circumstantial evidence and any reasonable inferences drawn from that evidence, we conclude there is substantial evidence of duress. Davila makes a brief reference to a violation of his federal due process rights. He suggests convictions not supported by sufficient evidence is a violation of his due process rights. Having concluded his convictions are supported by sufficient and substantial evidence, this claim is meritless.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

THOMPSON, J.

GOETHALS, J.